Looking at the Law

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The Privilege Against Self-Incrimination and Supervision

In *MINNESOTA v. Murphy*, 465 U.S. 420 (1984), the Supreme Court held that while a defendant does not lose his or her right against self-incrimination after being convicted of a crime, requiring a probationer to respond to questions that are relevant to his or her probationary status does not violate the Fifth Amendment. If a probationer has a privilege against self-incrimination with respect to certain information, the probationer must assert the privilege; furthermore, no "Miranda" warnings are required when a probation officer asks questions. This case was reported in this column in Kahn, "Looking at the Law," 48 *Federal Probation* 78 (Sept. 1984). But, of course, *Murphy* did not answer all of the Fifth Amendment questions that arise in the context of supervision, and officers are finding that offenders are asserting the privilege in challenging various aspects of supervision. The most recent challenges have come in connection with sex offender treatment in which offenders are expected to admit certain behavior.

In fact, officers may have little direct control over these situations. When offenders refuse to answer questions based on their claim that the refusal is protected by the Fifth Amendment, officers are generally advised to respect the claim of privilege. On the other hand, some refusals to respond to questions constitute possible violations of the conditions of release and officers must determine if, when, and how to present these violations to the court. The intent of this article is to provide officers with background on this issue to assist them in making these determinations.

Minnesota v. Murphy

Before examining the specific ways in which the privilege applies in supervision, a detailed description of *Murphy* is necessary, since that case remains the starting point for any discussion of the Fifth Amendment privilege in the context of supervision. Murphy had been placed on probation for a sex-related crime. Among the conditions of his probation were that he participate in a sex offender treatment program and that he be truthful with his probation officer in all matters. During Murphy's probation, a counselor from his treatment program informed Murphy's probation officer that Murphy had admitted to a rape and murder committed seven years earlier. Immediately thereafter, the probation officer asked Murphy to meet with her to discuss treatment, and at that meeting, the officer specifically asked about the rape and murder. Murphy initially reacted with anger and stated that he "felt like calling a lawyer," but after the officer stated that her concern was the relationship between the newly admitted offenses and the need for further treatment, Murphy admitted the crimes. The officer then provided that information to law enforcement and as a result, Murphy was convicted of murder. He challenged his conviction on the grounds that he was forced to make the admission in violation of his right against self-incrimination.

As noted above, the Court held that a probationer does not lose his Fifth Amendment privilege simply because he has been convicted of an offense and is in prison or under some form of supervision for that offense. And the privilege is available not only to an individual facing a criminal trial, but also in "any other proceeding, civil or criminal, formal or informal, where answers might incriminate him in future *criminal* proceedings." 465 U.S. at 426 (emphasis added). Nonetheless, the Constitution does not generally forbid the state to *ask* incriminating questions. If the offender answers these questions, his answers may be considered voluntary unless it can be shown that they were compelled within the meaning of the Fifth Amendment. If the offender chooses to assert the privilege, however, he may not be required to answer if there is a rational basis for believing that it might incriminate him.

There are exceptions to these rules. The most important is that established by *Miranda v. Arizona*, 384 U.S. 436 (1966), with regard to questioning that takes place in police custody. In this situation, the privilege is self-executing, which means that the person in custody must be given advice about the privilege. But in *Murphy* the Court held that a probation interview is not equivalent to police custody, since there is no arrest, the probationer is under no physical compulsion to remain in the interview, and the probationer is normally familiar with the interview process and therefore less likely to be intimidated than an arrestee in police custody.

The other exception discussed by the Court is presented in situations in which the state threatens the imposition of a substantial penalty for refusal to answer an incriminating question. For example, an offender may validly be required to answer questions relevant to the conditions of supervision. The fact that those answers may lead to a revocation proceeding does not trigger the protection of the Fifth Amendment because that protection only applies to criminal proceedings and revocation proceedings do not constitute criminal proceedings; they are more in the nature of administrative proceedings. But, the Court cautioned:

> the result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. …[I]f the

> State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused. And the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution. 465 U.S. at 435 n.7.

Under the circumstances presented in *Murphy*, the Court held, the offender was not threatened with a penalty for assertion of the privilege. He was aware that he was required to answer questions and that he might have his probation revoked for not answering those questions truthfully, but that did not constitute a penalty for asserting the privilege.

If *Murphy* resolved the question regarding the necessity of Miranda warnings in the context of supervision, it left a number of issues unresolved. Some of these involve the question of what kind of incrimination, that is, what form of criminal liability, is protected by the Fifth Amendment protection, but the most difficult issues involve the scope of the prohibition on the state's imposition of a penalty for an offender's failure to respond to questions put to him during supervision.

Nature of Incrimination

The Fifth Amendment privilege applies only to questions that might incriminate for a criminal offense. It does not apply when there is no realistic possibility of prosecution. Accordingly, the Court in *Murphy* noted that "there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings." 465 U.S. at 435 n. 7. As noted above, a revocation proceeding is not technically a criminal proceeding.

Therefore, if non-compliance might result in revocation but not a criminal proceeding, there is no potential of incrimination and thus no Fifth Amendment privilege. For example, a supervised releasee may be prohibited from traveling outside the judicial district without the permission of the probation officer. Traveling without permission might result in the revocation of supervised release and the imposition of a term of imprisonment, but it is not a crime and will not result in criminal prosecution. The offender may, therefore, be required to truthfully answer a question regarding his travel on pain of revocation.

Because of the double jeopardy clause of the Fifth Amendment, a person may not be convicted twice for the same offense. Thus, questions about an offense for which an individual has already been convicted are generally not incriminating.

However, the timing of the questioning about an offense for which an offender has been convicted could become an issue. The Supreme Court has recently determined that a defendant does not waive the privilege against self-incrimination by pleading guilty and that a sentencing court may not draw adverse inferences from a defendant's silence. *Mitchell v. United States*, _U.S._, 119 S. Ct. 1307 (1999). Accordingly, a defendant may properly decline to answer questions regarding the offense pending sentencing.

Even after sentencing, although this has not been firmly established, it appears that the better rule is that the Fifth Amendment privilege "continues until the time for appeal has expired or until the conviction has been affirmed on appeal." *United States v. Duchi*, 944 F. 2d 391, 394 (8th Cir. 1991). *See also Taylor v. Liefort*, 568 N.W. 2d 456 (Minn. App. 1997). Accordingly, an offender might validly assert the privilege while his conviction or sentence is on appeal. This could be a problem for probation cases or short sentences of incarceration, but will not be of concern in the case of supervised release supervision after a lengthy period of incarceration.

Some offenders have argued that even though they have already been convicted of the offense that is the subject of questions during supervision, answers to such questions might subject an individual to a separate prosecution for false statements or, in appropriate circumstances, perjury. In *State v. Imlay*, 813 P.2d 979 (Mont. 1991), *cert. granted*, 503 U.S. 905 (1992), *cert. dismissed*, 506 U.S. 5 (1992), Imlay was convicted of a sex offense though he testified and asserted his innocence. When asked to admit his offense during therapy, he asserted his privilege against self-incrimination. Imlay's refusal to answer resulted in his being dismissed from therapy, a violation of his probation. Admitting the offense, he claimed, would, among other things, subject him to the risk of a separate prosecution for perjury since he had denied the offense at trial. The Montana Supreme Court held that this forced choice between imprisonment for failure to complete therapy and new prosecution for perjury violated the Fifth Amendment. The Supreme Court initially granted certiorari, but later dismissed it as improvidently granted. Accordingly, this issue is not yet settled.

Nature of Penalty for Refusal to Answer

As noted above, the opinion in *Murphy* made reference to cases that have held that a state may not impose a penalty for the exercise of the Fifth Amendment privilege, but the Court was not entirely clear as to how that principle applied to revocation of supervision. *Murphy* cites a number of earlier cases, commonly referred to as the "penalty cases," that hold that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." 465 U.S. at 434, quoting with approval *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977). These cases recognize that the mischief the Amendment is designed to prevent may be accomplished as easily by imposing a penalty upon the exercise of the privilege against self-incrimination as by directly forcing the person to testify against himself.

The Court specifically indicated that if the state threatened revocation for asserting the privilege it would have created a penalty situation in violation of the Fifth Amendment. But then the Court added a proviso to its caution in a footnote:

> [A] state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circum-

> stances, a probationer's right to immunity as a result of his compelled testimony would not be at stake . . . and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as one of a number of factors to be considered by a finder of fact in determining whether other conditions of probation have been violated.

465 U.S. at 435 n. 7.[1] The decisions in two United States Courts of Appeals have relied on this language in holding that the failure of a probationer to truthfully respond to questions might subject him to sanctions without violating the Fifth Amendment. In *Asherman v. Meachum*, 957 F.2d 978 (2d Cir. 1992), a state prisoner had been placed in a home release program. While on release, the prisoner was ordered to report for a psychiatric evaluation. The prisoner reported but, on instructions from his attorney, declined to answer questions about the crime for which he was charged; a petition for habeas corpus regarding the prisoner's conviction was pending. As a consequence, upon reporting, he was taken into custody and his home release revoked for his refusal to cooperate.

While the court acknowledged that a state may not impose a penalty on an individual for invoking the privilege against self-incrimination, it held that when the state's inquiry is "reasonably related to the valid exercise of state authority," the state may take appropriate action without violating the Fifth Amendment. A governmental entity may not ask incriminating questions under a threat of using the answers in future criminal proceedings nor require a waiver of the protections of the Fifth Amendment. But the state may ask questions that are relevant to their legitimate public function and may penalize a refusal to answer.

Here, the court held, the questioning was a legitimate exercise of the state's responsibility to protect the public by attempting to understand the prisoner's mental state. The prisoner's release was revoked not because of the assertion of the privilege, but because the refusal to cooperate interfered with that responsibility. This seems a subtle distinction at best and the court specifically declined to address the question of whether answers to the state's incriminating questions could actually be used in a subsequent criminal proceeding.

While *Asherman* involved an offense for which the offender had already been convicted, the opinion clearly suggests that a state might in certain circumstances revoke probation in spite of the fact that compliance with the condition might result in the disclosure of information that could incriminate the offender.[2] The Seventh Circuit relied on *Asherman* in *United States v. Ross*, 9 F.3d 1182 (7th Cir. 1993), *judgment vacated on other grounds*, 511 U.S. 1124 (1994), a case that involved potential prosecution for new offenses. In that case, the offender was on supervised release for a firearms offense with a special condition that he not have contact with any firearms. After the probation officer reported a number of violations to the court, a revocation hearing was held. During the course of the hearing, the judge asked the offender what he had done with the sizable collection of guns the offender had possessed at the time of his conviction. The offender replied that he had disposed of the collection but refused to disclose how he had done so, asserting that the refusal was based on the Fifth Amendment. The court revoked supervised release based on that refusal.

The court determined that the district judge had made the inquiries regarding the gun collection solely to insure that the conditions of supervised release were being met. It was not interested in "ferreting out incriminating admissions to facilitate the further prosecution of the defendant." 9 F.3d at 1190. The district court was simply trying to insure compliance with the conditions of supervised release. Although the offender had the right to assert the protections of the Fifth Amendment at the supervised release hearing based on the fear that answers to the court's questions could lead to a new criminal prosecution, the court held that the offender did not have the "additional right to avoid the express conditions upon which he was granted . . . supervised release. He must make a choice. If he is to enjoy the advantages of supervised release, he must comply with the lawfully imposed conditions." 9 F.3d at 1191. *See also Idaho v. Crowe*, 952 P.2d 1245 (Idaho 1998).

There were strong dissents in both *Asherman* and *Ross*. Both urged that a person should not be forced to choose between answering questions that could incriminate the person or having release revoked for asserting the privilege against self-incrimination.

> [T]here can be no principled distinction between invocation of the fifth amendment and the failure to respond to a relevant inquiry. The two are inextricably intertwined. [The] failure to answer a relevant inquiry was solely and directly the result of [the] invocation of the right to remain silent.

9 F.3d at 1197. The dissents argue that an offender should not be required to answer incriminating questions until he is granted immunity from the answers being used in a new criminal prosecution. One United States district court has reached the same conclusion as the dissenters. In *Mace v. Amestoy*, 765 F.Supp. 847 (D.Vt. 1991), the state supreme court had determined that an offender's probation could be revoked because he refused to answer questions regarding illegal sexual behavior, since prosecution for those offenses was unlikely.[3] The district court granted the offender's petition for writ of habeas corpus because, the court found, the state's insistence on an answer to incriminating questions on pain of revocation place the offender in the classic penalty situation, which is prohibited by the Fifth Amendment. The court relied upon the language from footnote 7 in *Minnesota v. Murphy*, cited above, to reach the conclusion that the state should have granted immunity before insisting on the answers to the questions.

The recent Supreme Court decision in *Mitchell v. United States* does not, in my view, strengthen the arguments of the dissenters. The Court affirmed the continued vitality of the penalty cases in holding that a sentencing court may not draw an adverse inference from a defendant's silence regarding drug amounts even if the defendant has pleaded guilty to a drug offense. But the Court analogized the situa-

tion with the prohibition on drawing an adverse inference from the defendant's silence at trial, which is clearly prohibited by the Fifth Amendment. It specifically distinguished *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), in which it had held that an adverse influence is permissible from silence in a clemency proceeding, because that is a non-judicial process that is not part of the criminal case. Probation and supervised release revocation proceedings are conducted by judges, but as discussed above, they are in the nature of administrative proceedings and are not part of the original criminal case.

Clearly this is an issue that awaits further resolution. And, even if *Asherman* and *Ross* are to be followed, as a practical matter, the probation officer is not in a position to challenge an assertion of the privilege by an offender. As the Court noted in *Murphy*, once an individual asserts the Fifth Amendment privilege, "he may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without at that time being assured that neither it nor its fruits may be used against him in a subsequent criminal proceeding." 465 U.S. at 429.[4] It is not be up to the officer to determine whether there is a rational basis for the assertion of the privilege.

Despite these concerns, an assertion of the privilege in response to a request for information that is relevant to the offender's compliance with the conditions of release should not automatically halt an officer's attempts to secure compliance. Officers are clearly entitled to seek information relevant to offenders' compliance. Officers may and, when the requested information is sufficiently important, should report the refusal to comply with the officer's request to the court. It will then be up to the parties to make the relevant legal arguments and the court to determine whether the refusal may result in appropriate sanctions.

Sex Offender Therapy and the Assertion of Privilege

Offenders' assertion of the Fifth Amendment privilege has been frequent in sex offender therapy. Offenders with sex offense backgrounds are often ordered as a special condition of release to participate in a program of rehabilitative therapy. A common feature of such therapy is the requirement that the offender admit that he has a problem: that he has engaged in inappropriate sexual behavior. Such cooperation is considered so crucial to successful treatment that counselors will often not continue a therapeutic program without such an admission. Yet offenders are sometimes reluctant to make such admissions because the inappropriate behavior is criminal behavior and they fear that an admission could result in a new prosecution. When the offender refuses to answer questions about such behavior and is thereby dismissed from the program, he is in violation of the special condition. Under these circumstances, may the offender's supervision be revoked?

Probably the first questions an offender will be required to answer in a therapeutic sex offender program will be about the offense for which he was convicted. As noted above, however, the privilege is not generally applicable to questions about an offense for which the offender has been convicted. If the offender enters the program pending an appeal, however, he may be able to legitimately assert the privilege until the appeal is resolved—unless, of course, the court determines, as in *Asherman* and *Ross*, discussed above, that answers to such questions may be demanded as part of the offender's rehabilitative program.

When a therapeutic program is ongoing, an offender may be asked to discuss behavior that does not constitute the offense of conviction. Questions may be asked about behavior that was the subject of counts that were dropped as part of a plea bargain. The offender may be asked about the origins of his current difficulties, which might include behavior that has not, but could, be charged as a criminal offense. The offender will most likely be asked to admit to any current inappropriate sexual behavior. It is possible that such behavior could be a criminal offense. In these situations, the requirements of an offender's therapy, and, accordingly, his compliance with the therapy condition of release, may be directly in conflict with any assertion of the privilege against self-incrimination.

There are a number of issues presented by this situation and not all are clearly resolved at this time. It is reasonably well established, however, that the imposition of such a treatment condition is not unconstitutional. The majority of courts that have examined this issue have determined that the imposition of these conditions is not, in and of itself, a violation of the Fifth Amendment. A number of state courts have relied upon *Minnesota v. Murphy* to uphold probation and parole conditions that require the offender to participate in treatment. These cases also affirm that an offender does not have a privilege with respect to the offense for which he or she was convicted and sentenced. *Gyles v. State*, 901 P. 2d 1143 (Alaska Ct. App. 1995); *State v. Carrizales* 528 N.W. 2d 29 (Wis. Ct. App. 1995); *State v. Gleason*, 576 A. 2d 1246 (Vt. 1990).

With respect to questions that may lead to incriminating statements regarding offenses for which the offender has not been convicted, it seems clear that such questions may be asked without a prior warning regarding the use of answers in subsequent criminal proceedings. As discussed above, the Supreme Court held in *Minnesota v. Murphy* that Miranda warnings are not required before incriminating questions are asked in the context of an interview with a supervising probation officer. The reasoning of the holding would also apply to an interview with a counselor treating an offender whose conditions of release require such treatment. Should the offender decide to respond to the questions, the answers may be used not only for revocation purposes but might also be used in a subsequent criminal proceeding. The offender retains the right to refuse to answer those questions that could incriminate him. *State v. Tenbusch*, 886 P. 2d 1077 (Ore. Ct. App. 1994); *State v. Gleason*, 576 A. 2d at 1251. If the offender provides incriminating answers, however, those answers may be used against the offender in a criminal proceeding. The holding in

Minnesota v. Murphy clearly indicates that the privilege against self-incrimination is not self-executing, and in the context of an interview with a probation officer no "Miranda" warnings are necessary.

Without a grant of immunity, however, the required admission of criminal conduct other than the explicit conduct for which the offender was convicted poses problems. As indicated above, an offender retains a right against self-incrimination with respect to information that might result in criminal prosecution. If the invocation of the privilege is legitimate, the government may not penalize the offender by revocation for that exercise of his or her Fifth Amendment right. As the Supreme Court indicated, "a state may validly insist on answers even to incriminating questions and hence sensibly administer its probation system, as long as it recognized that the required answers may not be used in a criminal proceeding, and thus eliminate the threat of incrimination." 465 U.S. at 435-36 n. 7.

Polygraph Examinations

For the purpose of Fifth Amendment analysis, the issue of polygraph testing in supervision is nearly identical to the issue of requiring responses regarding criminal conduct. The polygraph is simply a device that purportedly assesses the truth of responses. But the frequency with which polygraphy is used in sex offender therapy and the controversy regarding its use in court make a separate discussion useful. There is virtually no federal case law on the use of polygraph tests in the context of supervision. The one case in which the issue was discussed indicates that polygraph results should not be used for revocation purposes, but the court held that its use in supervision was not violative of an offender's Fifth Amendment privilege against self-incrimination. The court held that the condition requiring him to submit to the polygraph test was reasonably related to his probation in that the possibility of detection deterred him from violating the conditions of his probation. *Owens v. Kelly*, 681 F.2d 1362 (11th Cir. 1982).[5] This holding is consistent with many state court decisions that hold that a condition requiring submission to polygraph testing is valid for supervision purposes.

But state case law is inconsistent regarding the use of polygraph results for revocation. *Compare Hart v. State*, 633 So.2d 1189 (Fla. 5th Dist.Ct.App. 1994) (polygraph not admissible for revocation purposes) with *State v. Travis*, 867 P.2d 234 (Idaho 1994). But the majority of state courts seem to permit conditions of probation that require submission to a polygraph test for the purpose of supervision or treatment. These courts reason, like the Eleventh Circuit, that the polygraph test may act as a deterrent even if it is not admissible in revocation proceedings. *Mann v. State,* 269 S.E. 2d 863, 866 (Ga.App. 1980). The test may also assist the probation officer in working with the offender to prevent violations before they occur. *People v. Miller,* 256 Cal.Rptr. 587 (Cal.App. 1989).

Most of the state cases on the subject appear to be sex offender cases. These cases stress the value of the polygraph in treatment because of the inherent secrecy of sex offenses and the common tendency of sex offenders to deny their sexual proclivities. Dealing with denial is essential in treatment and accordingly the polygraph provides invaluable assistance in such treatment. *Cassamassima v. State,* 657 So.2d 906 (Fla. 5th Dist.Ct.App. 1995).

In *Cassamassima,* the court considered the issues of the use of polygraph results in revocation proceedings as well as use in supervision and treatment. Constrained by a panel decision in *Hart v. State, supra,* which held that polygraph results could not be used in revocation, the court carefully considered the issue of use in supervision and treatment. As noted above, the court found that polygraph testing was clearly useful in supervision and particularly in the treatment of sex offenders. Accordingly, the testing was reasonably related to the rehabilitation of the offender as well as the protection of the public. And relying on *Minnesota v. Murphy*, the court determined that such a condition of probation did not violate the offender's Fifth Amendment privilege against self-incrimination.

While the court in *Cassamassima* did not permit polygraph evidence in a revocation proceeding to prove a false response, it stated that the test results could be used by the probation officer to enhance supervision, to more carefully scrutinize the offender's activities, or to commence an investigation of the offender. Certainly the Florida court's analysis is correct that the results of the polygraph may be useful in supervision and treatment. Any criminal activity that is identified or suggested by the polygraph testing can be further investigated by the probation officer or, particularly in the case of serious offenses, can be referred to the appropriate law enforcement agency. The fact that the results of the polygraph are not admissible in evidence does not mean that they can't be used to commence or aid an investigation. And, as discussed above, the test can be used by counselors treating the offender to deal with the offender's denial and for other treatment purposes.

Self-Incrimination and the Timing of the Revocation Proceeding

A final issue in which the Fifth Amendment privilege may be implicated in connection with revocation is procedural. The privilege against self-incrimination could become an issue when an offender commits a new offense during supervision and the court determines to proceed with the revocation hearing without waiting for the completion of new criminal proceedings based on the same conduct. In this situation, the offender may be presented with the choice of defending the revocation, in which case statements made in the course of the hearing could be used against the offender in the subsequent criminal trial, or standing silent and accepting revocation.

The right to speak in one's own defense is a fundamental aspect of due process and one which has been held to apply in a probation revocation proceeding. *Morrisey v. Brewer*, 408 U.S. 471 (1972). On the other hand, an offender does not

have a Fifth Amendment privilege against testifying about matters that may only result in the revocation of probation, because the privilege only applies when the information places one in jeopardy of a new criminal conviction. *See, e.g., United States v. Nieblas*, 115 F.3d 703 (9th Cir. 1997).

When the alleged violation also constitutes a criminal offense, however, the offender does have a right to decline to testify to matters that may result in a criminal prosecution. Whether or not the analysis above regarding revocation for failure to provide information relevant to monitoring compliance with conditions of release is accepted, probation may certainly be revoked if the violation of probation is proved pursuant to the presentation of evidence that is unanswered by the offender in the exercise of the privilege. The fact that a person is required to make a difficult strategic choice between the exercise of the privilege and the use of whatever testimony might be given does not mean that the individual is unconstitutionally penalized for the exercise of the privilege.

In M*cGautha v. California*, 402 U.S. 183 (1971), vacated on other grounds, 408 U.S. 941 (1972), the Supreme Court held that a defendant could not demand a bifurcated criminal trial so that he might remain silent at the guilt phase and testify in the sentencing phase. Accordingly, an offender may be required to choose between avoiding revocation by testifying in a revocation proceeding and avoiding conviction in a new criminal proceeding by exercising the privilege against self-incrimination. *United States v. Ross*, *supra*.

The dilemma presented by this choice, however, has led one court, in a case involving parole revocation, to hold that an individual must be given immunity against any use of the individual's testimony in any subsequent criminal prosecution. *Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968). Other courts have determined that no right to such immunity exists and that the offender must simply make the choice between revocation and prosecution. *Lynott v. Story*, 929 F.2d 228 (6th Cir. 1991); *Ryan v. Montana*, 580 F.2d 988 (9th Cir. 1978), *cert. denied*, 440 U.S. 977 (1979); *Flint v. Mullen*, 499 F.2d 100 (1st Cir.) (*per curiam*), *cert. denied*, 419 U.S. 1026 (1974).[6]

Conclusion

As stated above, there is little the probation officer can do to force an offender to answer questions in the course of supervision if the offender asserts a Fifth Amendment privilege. If the questions involve the offense of conviction, any other offense of which the offender has been convicted and sentenced, or violations of the conditions of supervision that do not constitute new criminal offenses, the officer should consider reporting the apparent violation to the court. If the refusals are questions that might elicit information about new offenses, the assertion of the right may possibly be legitimate. The officer should nonetheless consider referring the matter to the court for resolution, particularly if there is any doubt about the supervisee's assertion that the question calls for incriminating information. While it is possible in this situation that the assertion of the right will be upheld, the issue should be determined by the court after argument by counsel, not determined by the officer.

NOTES

[1]Any reliance by the probation officer that a grant of immunity may be secured in the context of a revocation of probation or supervised release would be misplaced. The authority for grants of immunity lies in 18 U.S.C. § 6003, which provides that the United States Attorney's office will initiate any grant of immunity for the use of testimony in a criminal proceeding. The court has no independent authority to grant immunity without a request by the government. *See United States v. Angiulo*, 897 F.2d 1169, 1191 (1st Cir.), *cert. denied*, 498 U.S. 845 (1990), and cases cited therein. The United States Attorney's office is not likely to be interested in initiating immunity in revocation cases on any regular basis.

[2]*See also Johnson v. Baker*, 108 F.3d 10 (2d Cir. 1997), in which an inmate unsuccessfully claimed that exclusion from a prison program based on his refusal to answer questions about the offense for which he was convicted was violative of his Fifth Amendment privilege.

[3]*State v. Mace*, 578 A.2d 104 (Vt. 1990). Other state courts have held that the Fifth Amendment is not violated by revocation of probation or parole based on refusal to answer questions regarding illegal sexual activity. *See, e.g., Gyles v. State*, 901 P.2d 1143 (Alaska 1995); *Gilfillen v. State*, 582 N.E.2d 821 (Ind. 1991).

[4]A waiver of the Fifth Amendment privilege is not a solution to these difficulties. A waiver of the privilege may not be required since such a requirement would be clear violation of the prohibition on the imposition of a penalty for the exercise of the privilege. Likewise, it may not be deemed voluntary if the alternative is the refusal to grant release. *State v. Eccles*, 877 P.2d 799 (Ariz. 1994).

[5]The state of the law regarding the admissibility of scientific evidence has changed since *Owens v. Kelly* with the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and the Eleventh Circuit pursuant to that decision has held that polygraph evidence is no longer per se inadmissible in that circuit. *See, e.g., United States v. Gilliard*, 133 F.3d 809 (11th Cir. 1998). There is still insufficient scientific support for the procedure to recommend its attempted use in revocation proceedings.

[6]Commentators have suggested that revocation proceedings should be delayed until the criminal charges are disposed of to avoid placing the offender in an untenable position. "Note, The Due Process Need for Postponement or Use Immunity in Probation Revocation Hearings Based on Criminal Charges," 68 Minn. L. Rev. 1077 (1984). However, most decisions in federal court have determined that there is no constitutional right to such a delay.